

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original Affidavit of Nailing

77-2080

To be argued by
RICHARD P. CARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2080

FRANCISCO SOLIMENE,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

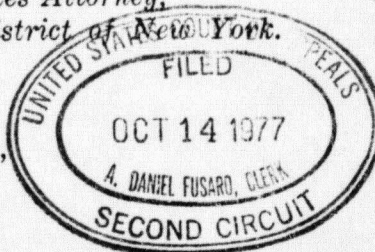
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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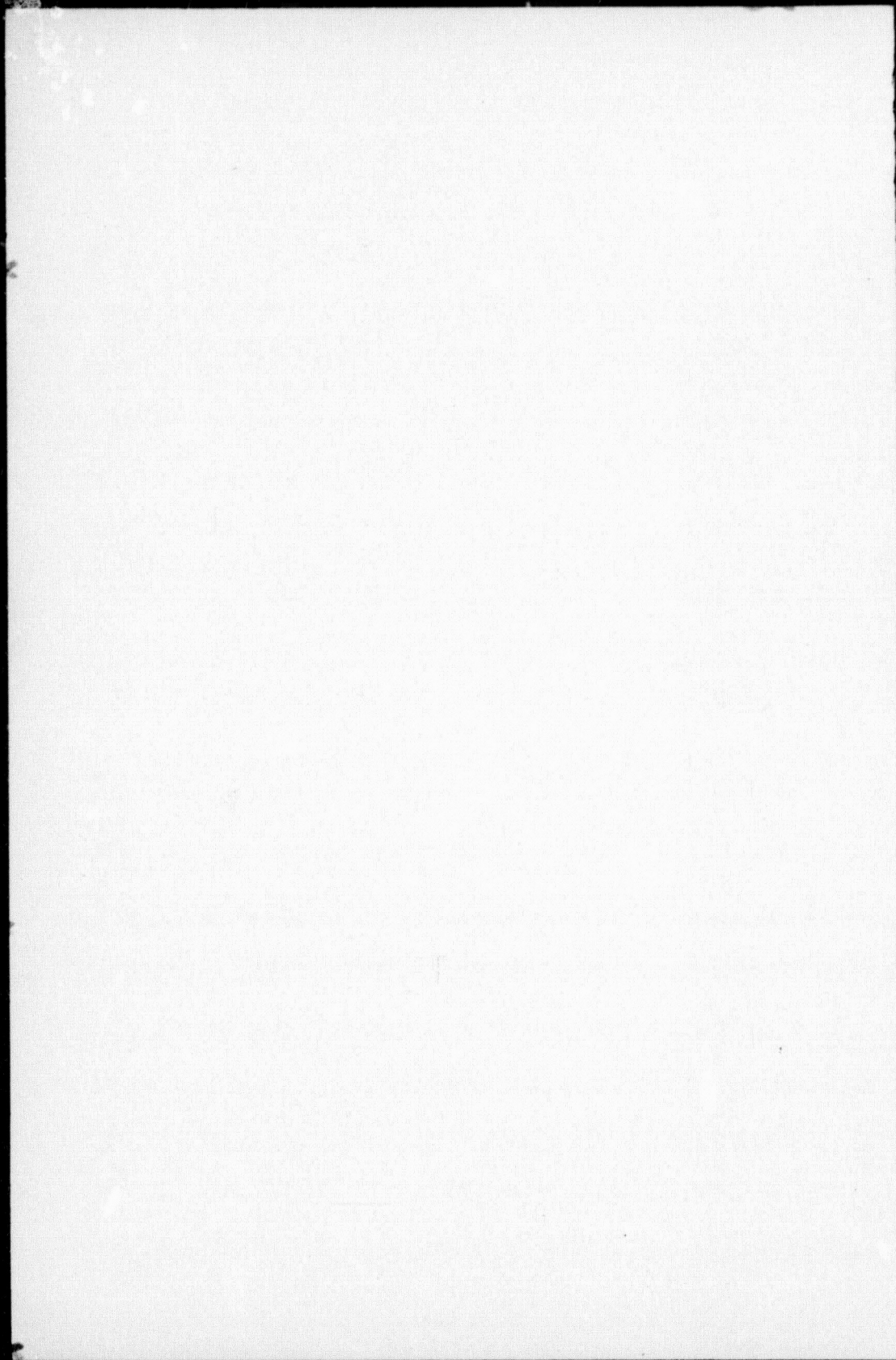


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Docket No. 77-2080

FRANCISCO SOLIMENE,

Appellant,

—against—

UNITED STATES OF AMERICA

Appellee.

BRIEF FOR THE APPELLEE

Statement of Issues

1. Whether the District Court properly applied the correct legal standard in determining that certain evidence, allegedly suppressed by the prosecutor, would not have affected the jury's verdict.

2. Whether, in any event, Appellant failed to establish sufficient grounds to warrant an evidentiary hearing on his allegations of prosecutorial misconduct.

Statement of the Case

**A. Proceedings Prior To The Present Application
For A Writ Of Habeas Corpus**

On May 19, 1972, appellant was sentenced by the United States District Court for the Eastern District of New York (the Honorable George Rosling, United States District Judge) to a fifteen-year term of imprisonment to

be followed by fifteen years of special parole upon his conviction, following a jury trial, of conspiracy to smuggle and sell 155 lbs of heroin, in violation of 21 U.S.C. § 846. Judgment was entered against appellant and a co-defendant, Louis Boyce, in *United States v. Boyce*, 71-Cr-1281, and was affirmed by this Court without opinion. 472 F.2d 1404 (2d Cir.), *cert. denied*, 414 U.S. 819 (1973).

Thereafter, appellant sought to have his sentence reduced but on March 11, 1974, appellant's motion to reduce sentence was denied by the Honorable Jacob Mishler, Chief Judge. The decision of the District Court was affirmed on appeal. 505 F.2d 728 (2d Cir. 1974).

On April 7, 1975, appellant filed a prior petition for a writ of habeas corpus. This petition was denied in a "Memorandum of Decision and Order" issued on May 13, 1975, by the Honorable Jacob Mishler, Chief Judge.

The present application for a writ of habeas corpus is based up grounds which were not previously raised by appellant in the prior appeal, the motion to reduce sentence or the April 1975 petition for a writ of habeas corpus.

B. The Present Petition For A Writ Of Habeas Corpus And The Return To The Petition

On January 28, 1977, appellant filed his second and the present "Motion To Vacate Sentence Under 28 U.S.C. § 2255" (hereinafter referred to as the "Petition").¹ On April 29, 1977, the Government filed its "Return To The Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2255" (hereinafter referred to as the "Re-

¹ A copy of the Petition is contained in the appendix ("App."), at 2-8.

turn").² The Return was verified³ and supported by two affidavits—that of the former Assistant United States Attorney, George G. Bashian, Jr. Esq., who prosecuted the case against appellant and his co-defendant,⁴ and an investigating United States Customs Service agent, William P. McMullen.⁵ The "Reply of Petitioner" (hereinafter referred to as the "Reply")⁶ was filed on May 16, 1977.

The Petition sought to vacate the judgment of conviction and sentence on essentially two grounds. The first ground was that the chief witness for the prosecution, Ruben Americo Altamirano ("Altamirano") had perjured himself when he denied having had any record of conviction in Argentina.⁷ The second ground was that the Government prosecuting attorney knew of the existence of Altamirano's Argentine criminal record, falsely represented that the Government had no knowledge of this criminal record, failed to disclose the existence of the Argentine criminal record to appellant's then defense counsel and entered into an agreement with Altamirano that, in return for his testifying for the Government, he would not be surrendered to the Argentine authorities.⁸ Appended as Exhibit A to the Petition is purportedly a "copy of said witness' criminal record in Argentina"⁹

² A copy of the Return, but with Exhibit I thereto omitted, is at App. 9-21.

³ App. 17.

⁴ App. 18-19.

⁵ App. 20-21.

⁶ App. 22-24.

⁷ ¶ 4 of the Petition, App. 3-4.

⁸ ¶ 6-7 of the Petition, App. 4-5.

⁹ ¶ 4 of the Petition, App. 3.

with an English translation thereof.¹⁰ This document on its face is not an authenticated copy of a criminal record, but a "summary" of purported court records of someone named Ruben Americo Altamirano. Appellant has not denied that fingerprints did not accompany this document nor the preceding inquiry made by appellant. (See Appellant's Brief at 4; Reply at App. 22).

In its verified Return the Government admitted that Altamirano had testified that he had not been convicted of any crimes in Argentina or Uruguay,¹¹ but it specifically denied all of appellant's other allegations and statements not otherwise admitted or distinguished.¹²

In Part II of the verified Return, the Government specifically denied that:

"there was a knowing use of perjured testimony by the Government or that the Government knowingly failed to disclose the existence of the Argentine criminal record of Altamirano." (App. 10.)

¹⁰ App. 7-8. Appellant in his Brief to this Court (at 4) has stated that his incarceration and lack of funds have severely limited his ability to investigate further the possibility of Altamirano's having an Argentine criminal record. These facts were not established below and are not conceded by the Government to be true even though they are immaterial. Indeed, to the undersigned's knowledge appellant at the original trial and in these proceedings has been represented by privately retained attorneys.

¹¹ Part I of the Return, App. 9-19, citing the Trial Transcript at 617. Pertinent portions of the Trial Transcript were appended as Exhibit I to the Return, but Exhibit I was omitted from the Appendix. Exhibit I, however, is contained in the Appendix of the United States of America. (References to the Trial Transcript in the Appendix of the United States will be cited as "Tr. ".)

¹² Part I of the Return, App. 10.

The basis for this denial was the following:

(1) Theodore Kreiger, defense counsel for co-defendant Louis Boyce, stated to the trial court that he was informed that Altamirano had a criminal record in South America and had asked the Government to ascertain if such a criminal record existed.¹³ Customs Agent William P. McMullen stated in response that an inquiry of South American authorities was made, accompanied by Altamirano's fingerprints, and that the "Argentine Police sent back a cable stating ' * * * That there was also no criminal record on file for Rubin Altamirano or [his brother] Caesar Altamirano.' (Trial Tr. at 532.)" ¹⁴

(2) Both the Government prosecuting attorney, Mr. Bashian, and the investigating Customs Agent, Mr. McMullen, who were involved in the above exchange, submitted affidavits attesting that at the time of the Boyce-Solimene trial:

(a) neither knew of the existence of any Argentine criminal record of Altamirano, and;

(b) contrary to appellant's statement in his Brief,¹⁵

¹³ App. 10; Tr. 527-28.

¹⁴ App. 11. This exchange did not take place after Altamirano completed testifying (cf. Appellant's Brief at 4), but during Altamirano's cross-examination.

¹⁵ Appellant on page 5 of his Brief erroneously states, "Neither official, however, denies having seen a document from any other government establishing such a record.***"

Mr. Bashian attested in his affidavit (App. 19) that

"2. *** I neither saw nor knew of the existence of any Federal Bureau of Investigation document or document from the United States Customs Service which stated that Ruben Americo Altamirano had a prior conviction.

* * * *

"4. At the time of the *Boyce-Solimene* trial, I neither saw nor knew of any document which stated that Ruben Americo Altamirano was convicted of any crime by the Argentine courts."

See also ¶ 2-3 of the McMullen affidavit, App. 20-21.

neither saw or knew of the existence of any document in the Government's possession which stated that Altamirano had such an Argentine criminal record.¹⁶

(3) Finally, defense counsel in the original trial were shown and reviewed the Government's own investigative file on Altamirano, which presumably confirmed the Government's representations to the Court that it had no indication of an Argentine criminal record.¹⁷ This latter fact has never been denied or even addressed by appellant, either in his Reply or in the present brief. Indeed, rather than attempting to verify the above facts with original defense counsel, appellant merely attempts to utilize semantics to raise ambiguities which do not exist.¹⁸

In Part III of the Return, the Government refused to admit that the criminal record referred to in Exhibit A in the Petition was that of Altamirano for the following reasons:

(1) It was not a properly authenticated copy of an Argentine public document (see Rule 902(d), Fed. R. Ev.) but rather a letter summarizing purported court documents, and Altamirano's fingerprints were neither

¹⁶ App. 11.

¹⁷ App. 11. *See also*, Tr. 528; ¶ 2 of the McMullen aff., App. 20-21. The denial of knowledge of the alleged Argentine criminal record precludes necessarily the existence of any agreement not to surrender Altamirano to Argentine authorities.

¹⁸ The Government objects to any implications of its misrepresenting or misleading the District Court by failing to disclose or admit that in some way at any time prior to the filing of the present Petition it knew that Altamirano had an Argentine criminal record. Appellant charged that the Government at the time of the Boyce-Solimene trial knew of Altamirano's Argentine convictions, failed to disclose them to defense counsel, and deliberately used perjured testimony to obtain appellant's conviction. Mr. Bashian's and Agent McMullen's affidavits specifically deny these allegations.

sent to the Argentine authorities by appellant nor did a set of fingerprints accompany the Argentine response.¹⁹

(2) The facts stated in this Argentine letter were inconsistent with Altamirano's testimony at trial concerning his birth and activities in Uruguay and Argentina.²⁰

(3) Altamirano's purported perjurious denial of an Argentine criminal record for illegal use of an automobile and robbery convictions for which he was allegedly sentenced in 1961 and 1964, was inconsistent with the fact that at trial he had admitted other and far more serious criminal activities.²¹ Contrary to appellant's representation in his Brief (at 15), the criminal activity admitted by Altamirano at trial included not only those activities connected with his involvement with the heroin import conspiracy (the subject of the Boyce-Solimene trial), but other criminal conduct as well—*e.g.*, dealing in stolen goods, income tax evasion and his personal use of cocaine.²²

(4) Even assuming that Altamirano did have the purported criminal record, the perjury was immaterial and not reasonably likely to have affected the judgment of the jury because:

(a) the evidence of Altamirano's alleged Argentine criminal record was cumulative;²³

(b) Altamirano's credibility was vigorously attacked by defense counsel on the grounds of, *inter alia*, his extensive involvement in criminal activities and his motive

¹⁹ App. 13-14.

²⁰ App. 14, including n. 2.

²¹ App. 15.

²² App. 14. See also App. 15; Tr. 1063-66, 1084-85, 1094-1104.

²³ App. 15.

for testifying, *e.g.*, the hope for lighter sentence if he cooperated with the Government;²⁴ and

(c) Altamirano's testimony on the activities of Boyce and Solimene was supported by substantial collaborative documentary and testimonial evidence.²⁵

Alternatively, the Government objected to the motion to vacate the sentence on the ground that the question of Altamirano's Argentine criminal record could and should have been raised earlier, and indeed could clearly have been made prior to the expiration of the time to make a motion under Rule 33, Fed.R.Crim.P., for a new trial on the basis of newly discovered evidence.²⁶

C. The District Court's Dismissal of the Petition For A Writ Of Habeas Corpus

On May 18, 1977, the petition was dismissed by Honorable Jacob Mishler, Chief Judge, United States District Court for the Eastern District of New York, without having held a hearing.²⁷ In his decision,²⁸ the District Court, assuming appellant's allegations to be true, held that the information about Altamirano's Argentine criminal record failed to raise any reasonable doubt that such information would have affected the jury's evaluation of Altamirano's credibility (App. 33-34):

**** Altamirano was the Government's chief witness against petitioner and his co-defendants. His credibility and motive for testifying were important in determining guilt or innocence. The jury, however, was well aware that Altamirano was no babe in the woods. He testified about his

²⁴ App. 15.

²⁵ App. 16.

²⁶ App. 16.

²⁷ App. 35.

²⁸ App. 25-35.

conviction for conspiracy to possess and sell one hundred and fifty-five (155) pounds of heroin (Tr. 237-38); his participation in other narcotics transactions (Tr. 433-36); his cooperation with the government in the hope of obtaining leniency (Tr. 405-06); his personal use of narcotics (Tr. 610); his evasion of the tax laws (Tr. 622-23); and his other possible motive for testifying, which was to obtain a promise from the government not to prosecute his brother for perjury (Tr. 656-57). Evaluating the significance of the *Brady* material at issue here "in the context of the entire record," *United States v. Agurs, supra*, 96 S.Ct. at 240²; *United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976), leaves no reasonable doubt that additional material such as the two decade-old robbery convictions in Argentina could not have changed the jury's opinion of Altamirano's credibility. [Footnote omitted.] While there was more than enough evidence to find Altamirano an untrustworthy witness, it is also apparent that the corroborative documentary evidence and testimony introduced by the government supported Altamirano's testimony sufficiently for the jury to believe that, at least in this case, he was telling the truth."

Since under the circumstances the omitted evidence lacked significant probative value, the District Court also concluded that the questions concerning prosecutorial misconduct became irrelevant.²⁹

The District Court alternatively determined that appellant had failed to adequately support his conclusory charges with respect to the issue of prosecutorial misconduct to warrant a hearing and had also failed to give any explanation why the Government's alleged suborna-

²⁹ App. 34.

tion of perjury was not discovered until five years after conviction.

Accordingly, for all the above reasons, the Petition was dismissed.

ARGUMENT

POINT I

The District Court, Properly Applied The Correct Legal Standard And Accordingly Its Dismissal Of The Petition Should Be Affirmed.

The District Court assumed *arguendo* that appellant's allegations were true, and held (App. 33-34) that, notwithstanding, in light of the entire record the Petition had to be dismissed because the allegations did not create a "reasonable doubt" that the additional *Brady* evidence could have affected the jury's evaluation of Altamirano's credibility—particularly in light of the nature of the evidence (the 20-year old robbery convictions), Altamirano's admissions as to other criminal activity, and the evidence corroborative of his testimony. See pp. 8-9, *supra*.

Appellant contends that in making this determination the District Court applied the wrong standard and that the decision in *United States v. Agurs*, 487 U.S. 97 (1976), required, in a case involving the knowing use of perjured testimony, that the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Footnote omitted) 427 U.S. at 103.

The District Court construed the *Agurs* decision as also adopting the standard enunciated in *Brady v. Mary-*

land, 373 U.S. 83, 87 (1963),³⁰ and determined that the *Brady* standard was not distinguishable in the present case from the "any reasonable likelihood" test. As the District Court explained in footnote 2 of its decision (App. 36):

"The standard applicable to subornation of perjury—a 'reasonable likelihood that the false testimony could have affected the judgment of the jury'—seems indistinguishable in the context of this case from the standard applicable to the failure to comply with a *Brady* request as to volunteer *Brady* material—the omitted evidence creates a reasonable doubt that did not otherwise exist'.
* * *"

Thus, in the District Court's opinion there was no reasonable likelihood that the false testimony could have affected the judgment of the jury, because in light of the entire record there was no reasonable doubt that the additional material could have changed the jury's opinion of Altamirano's credibility.

The District Court's conclusion is amply supported by the facts in the record relied upon. First, the additional evidence was clearly cumulative since there was more than enough evidence in the record to challenge Altamirano's credibility and trustworthiness, as the District Court found.³¹ Indeed the trial judge, Judge Rosling, quite dramatically expressed the same conclusion during the colloquy on the possible existence of a South American criminal record (App. 15; Tr. 530-31):

"You have heard enough from this fellow to hang fourteen witnesses, not one.
* * * * *

³⁰ App. 28.

³¹ App. 33.

"* * * It has been said any number of times by the Court of Appeals, which points to a record that indicates in a record that it appears as strongly as anybody could want to have it, that the witness leaves a lot to be desired in the way of integrity, honesty, character, of being law abiding and so forth, and therefore any additional proof of criminality is so to speak 'gilding the lily,' to coin a phrase."

Second, Altamirano's credibility and motives were vigorously attacked by defense counsel and argued to the jury as grounds for disbelieving Altamirano's testimony.³²

Third, as the District Court found, Altamirano's testimony was supported by collaborative documentary and testimonial evidence.³³ Indeed, the Government prosecutor did not attempt to deny that Altamirano was a criminal or that he was not guilty of the many crimes he testified to, but rather relied on the strength of this collaborative evidence.³⁴

The jury chose to believe Altamirano, and it is inconceivable that the existence of the purported two Argentine convictions would have made any difference at all:

"* * * In seeking to vacate a judgment allegedly based on perjured testimony, [petitioner] has the burden of establishing that it was material to the conviction. * * *" *Wapnick v. United States*, 311 F. Supp. 183, 187 (E.D.N.Y. 1969), *aff'd*, 423 F.2d 1361 (2d Cir.), *cert. denied*, 400 U.S. 845 (1970).

³² App. 15; Tr. 1063-66, 1084-85; 1094-1104.

³³ App. 34.

³⁴ App. 16; Tr. 1160-81; 1187-91.

Appellant has clearly not met that burden. See also *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269-71 (1959); *United States ex rel. Thomas v. Brierton*, 408 F. Supp. 14, 22 (N.D. Ill. 1976).

Accordingly, the District Court's dismissal of the Petition should be affirmed.

POINT II

Alternatively, The Dismissal Of The Petition Should Be Affirmed Because Appellant Failed To Provide A Sufficient Basis To Warrant A Hearing On The Issue Of Prosecutorial Misconduct.

It cannot be reasonably contested that in the absence of prosecutorial misconduct, this Petition was properly dismissed under the correct standard. For this reason the dismissal of the Petition should be affirmed if this Court agrees with the finding of the District Court that appellant has failed to provide a sufficient basis to warrant an evidentiary hearing on the issue of prosecutorial misconduct.

Appellant contends that it was reversible error for the District Court to have dismissed the Petition because certain important facts were placed in issue. However, as the Supreme Court, recently stated in *Blackledge v. Allison*, — U.S. —, 52 L.Ed.2d 136, 151 (1977), "[t]his is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing."

Here the very grounds being alleged—the possibility of an Argentine criminal record—were known by de-

fense counsel at trial. Appellant's trial counsel could, of course, have decided not to rely upon the Government's representations concerning this matter or upon his examination of the Government's investigative case report on Altamirano, but rather, on his own initiative, have made in 1972 the same inquiry appellant apparently made in 1975 respecting Altamirano's criminal record for the years 1961-1968. No explanation has been given why trial defense counsel did not pursue the matter, and appellant has failed to deny that defense counsel examined the Government's investigative file on Altamirano which would have contained the response of the Argentine police to the Government's inquiry on the existence of a criminal record. Similarly, appellant has not sought on collateral review to have his or Boyce's trial attorney explain what they knew, what they saw, or why the matter was not timely pursued or raised previously.³⁵ As the Court stated in *Price v. Johnston*, 334 U.S. 266, 291 (1948):

"*** The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

Here there is not one shred of evidence supporting appellant's bald accusation that the Government lied to the trial court and to defense counsel at trial concerning the absence of an Argentine criminal record which the

³⁵ See *United States v. Franzese*, 525 F.2d 27, 31 n. 7 (2d Cir. 1975), cert. denied, 424 U.S. 921 (1976); *United States v. Young*, 426 F.2d 93, 95 (6th Cir. 1970).

Government knew at the time existed. Appellant's charges to the contrary are purely speculative and not evidentiary.³⁶ See *United States v. Franzese, supra*, 30-31.

Not only was there no evidence of prosecutorial misconduct, but there was, indeed, ample evidence that the Government disclosed all it knew of Altamirano's criminal record to defense counsel at trial and that the Government had no knowledge that Altamirano had an Argentine criminal record. This evidence in the record was further supported by the sworn statements of the prosecuting attorney and investigating Customs agent.

As the Court stated in *Blackledge v. Allison, supra*, — U.S. at —, 52 L.Ed. at 147:

"The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.***" (Citations omitted).

For the above reasons the District Court did not err in dismissing the Petition without first affording appellant an opportunity for an evidentiary hearing.

³⁶ The exhibit attached to the Petition likewise fails to provide sufficient supportive evidence. First, no fingerprints accompanied this document or appellant's inquiry. Thus, at best, it is a document which refers to someone using the name of Ruben Americo Altamirano. Secondly, it is a summary of purported court records and not a duly authenticated copy of these records. (See Rule 902 (3), Fed.R. Ev. and footnote 1 of the decision below, App. 36.) It is thus impossible to ascertain the accuracy of the facts stated. Finally, even assuming that Altamirano did have on his record the purported criminal convictions in 1961 and 1964, nevertheless, this document, without more does not indicate or suggest that the Government was indeed informed by the Argentine authorities that Altamirano had a criminal record in that country.

CONCLUSION

For the reasons stated herein, the Court should affirm the Order of the District Court dismissing the Petition for a Writ of Habeas Corpus.

Dated: Brooklyn, New York
October 12, 1977

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
RICHARD P. CARO,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of October 1977 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Michael Clutter

1409 Peachtree St., N.E.

e

Atlanta, Ga 30309

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

14th day of October 1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979